



Amoro & another v Marwa (Sued as the legal administrator of the Estate of Marwa Makorere Nyamorangi - Deceased) (Environment & Land Case E039 of 2021) [2024] KEELC 5163 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 5163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E039 OF 2021
MN KULLOW, J
JANUARY 31, 2024**

BETWEEN

RUSIAH NYAMOITA AMORO 1ST APPLICANT

ROBI MARWA CHACHA 2ND APPLICANT

AND

ESINA MIGALIZA MARWA (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF MARWA MAKORERE NYAMORANGI - DECEASED) RESPONDENT

JUDGMENT

1. The Applicants herein commenced this suit vide an Originating Summons dated 14th September, 2021 against the Respondent seeking the following orders: -
 - i. That the Applicants have acquired title to the whole of land parcel No. Bugumbe/ Isebania/96 by adverse possession.
 - ii. That an Order do issue vesting title to the whole of that parcel No. Bugumbe/ Isebania/96 in the name of Rusiah Nyamoita Amoro and Robi Marwa Chacha as absolute proprietors and that all necessary forms be signed by the Deputy Registrar of the High Court as the situation may require.
 - iii. That an Order do issue directing the Land Registrar to rectify the register of land parcel No. Bugumbe/ Isebania/96 by deleting the name of Marwa Makorere Nyamorangi – Deceased or any other name whatsoever entered thereafter and substituting it with the name of Rusiah Nyamoita Amoro And Robi Marwa Chacha as tenants in common in equal shares and the Applicants be issued with the title deed in respect of the said parcel of land.



- iv. Costs of this suit.
2. The Originating Summons is premised on 22 grounds thereon and on the 2nd Applicant's Supporting Affidavit sworn on even date, on his own behalf and on behalf of the 1st Applicant. He averred that the original owners of the suit land were brothers; Magaigwa Mwita and Oyeko Mwita.
 3. That sometimes around the year 1966 the said true owners of the suit land vacated/ abandoned the suit parcel and moved to Tanzania and left the mother of Marwa Makorere Nyamorangi as the caretaker of the suit land.
 4. It is his contention that the said caretaker built a small house structure on the suit land and fraudulently got her son Marwa Makorere Nyamorangi to be registered as the proprietor of the suit land during the adjudication process sometimes in the year 1972.
 5. It is his claim that sometimes on 13/06/1989; one Marwa Waisenseri Wantore, who is since deceased, purchased the suit land from the original true owners and paid the consideration by paying 14 herds of cattle, an agreement was drawn, signed and witnessed by the then Area Chief. At the time of the sale, the caretaker's son, Marwa Makorere Nyamorangi, was present and was given part of the consideration as a form of gratitude. The said Marwa Makorere Nyamorangi promised to vacate the parcel and give possession to the said purchaser and his family. Further, he was to facilitate the transfer of the said suit land which he has refused/ ignored to do to date.
 6. He further contends that pursuant to the sale, the purchaser and his family took immediate possession of the remaining portion, built houses and carry out cultivation and have been living on the suit land peacefully to date. That at the said time, the said Marwa Makorere Nyamorangi and his entire family had vacated the suit land and also moved to Tanzania
 7. He thus deposed that the said Marwa Makorere Nyamorangi who is since deceased and/or his estate holds the title of the suit land in trust and in favor of the Applicants by operation of the law.
 8. He further maintained that their possession and occupation of the whole suit parcel has been without the consent and authority of the Respondent and they have extensively developed the said land which they have occupied for more than 30 years since the year 1989. They have even buried some of their family members on and neither the deceased nor his family raised any complaints.
 9. He consequently urged the court to allow their case and to grant the orders sought.
 10. The Defendants entered Appearance through the firm of Omonde Kisera & Co. Advocates and filed a Replying Affidavit sworn on 12th May, 2023. She confirmed that she is one of the Administrator of the estate of her deceased husband. She further averred that the suit land is the free property of her late husband, having been acquired and registered in his name as the owner thereof on 16/02/1972 as the 1st owner.
 11. She dismissed the allegations made by the Applicants of the original owners of the suit land being Magaigwa Mwita and Oyeko Mwita and that the purported sale thereof to the Applicants' father remains an illegality.
 12. It is her claim that the Applicants sought permission to stay in a small portion of the suit land from her deceased husband, who gave them permission to use a portion measuring approx. 1 Acre.
 13. She maintained that her late husband settled his family and two wives on the suit land and they have remained in possession and occupation thereof to date and that they have full control and possession of the suit land save for the 1 Acre occupied by the Applicants.



14. It is further her claim that the family has on several occasions demanded that the Applicants render a vacant possession of the portion measuring 1 Acre but they have failed and refused to comply and nonetheless continued their stay without their permission.
15. It is her contention that the photographs annexed to the Originating Summons comprises of structures which are non-existent on the suit land and trees which have not been grown on the suit parcel.
16. She also dismissed the Applicants' suit and stated that there was no evidence provided to show that they are in possession of any portion or the entire suit land. She thus urged the court to dismiss the suit with costs.

Trial

17. The Applicants' case proceeded for hearing on 02.10.2023; the 1st Applicant testified as PW1; she adopted her Supporting Affidavit and Supplementary Affidavit dated 14/9/2021 and 22/11/2022 respectively as her evidence in chief.
18. It was also her testimony that she lives and occupies the suit land together with the 2nd Applicant who is her co-wife since the year 2000, which occupation has never been interrupted. That the said land was purchased by her late husband in the year 1989. she further stated that she has built houses and is cultivating the remaining portion.
19. She also produced the documents annexed to her Affidavit as Plaintiff Exhibits 1 – 9 as follows; copy of the Agreement for sale dated 13/6/1989 as Pexh. 1, Agreements for sale dated 28/6/1999 and 18/4/2007 as Pexh. 2 (a) & (b), bundle of pictures of the suit parcel and the homestead and the certificate of electronic evidence as Pexh. 3(a) & (b), copy of the land register/ green card for Bugumbe/ Isebania/96 as Pexh. 4, bundle of the pleadings filed in Migori High Court Succession Cause No. 457 of 2014 as Pexh. 5, copy of the Grant of letters of administration intestate as Pexh. 6, copy of the Kenya Gazette dated 19/07/2013 as Pexh. 7 in further support of their case.
20. On cross- examination by Mr. Kisera, she stated that the suit land measures about 16.5Ha and that the same was registered in the name of Marwa Makorere who is her deceased husband. She conceded that she was not aware whether the succession in respect to the estate of her late husband which was filed in the high court has been concluded.
21. She further conceded that from the Green Card, one John Meng'anyi Magaiwa has been registered as the last owner of the suit land. She admitted that she had not adduced a surveyor's report to show that there are houses on the suit land.
22. She further stated that she has filed severally cases against the Respondent and even the last registered owner. That there was a suit filed at the Maberu LDT Kuria West Case No. 11/2018 an award was made. On re-examination; she clarified that the LDT ruled that it had no jurisdiction to hear the case.
23. The 2nd Applicant testified as PW2; she adopted her Supporting Affidavit dated 14/9/2021 as her evidence in chief. On cross-examination, she maintained that she lives on the suit land but conceded that she had not produced photos as evidence of the same.
24. She further confirmed that one John Magaiwa is the registered owner of the suit land but that he had not been sued. She reiterated that they had were not given a portion of the suit land measuring 1 Acre and maintained that they have lived on the entire suit land.
25. Joseph Nkonya Mwita testified as PW3; he was a retired area chief within Isebania Sublocation. He adopted his witness statement dated 14/9/2021 as his evidence in chief. He further stated that the



- suit land was bought by the Applicants' husband from Mwita Oyeko and Magaiwa Mwita and the consideration price was paid in his office/ presence. He maintained that the land is currently occupied by the wives of the deceased.
26. On cross-examination; it was his testimony that he is the one who drew the agreement for sale of the suit land and the same was between Wantora, the Applicants' husband as purchaser and Magaiwa Mwita and Oyeko Mwita as the vendors. He however conceded that at the time of the said sale, he had not seen any documentation showing that the said vendors owned the said land even though he knew that they were staying on the suit land. He further admitted that from the Green Card, the registration of the suit land was done on 16.2.1972 but that the said vendors had not been shown as the owners thereof.
 27. Mwita Oyeko Mwita testified as PW4. It was his testimony that the suit land previously belonged to his late father Rioba Oyeko and his uncle Maigwa Mwita and that he was born on the suit land. He further stated that the said land had been sold to the 1st Applicants' late husband. He confirmed that the land is currently occupied by the widows and children of Marwa Senseri, who is also deceased.
 28. On cross-examination; he reiterated that he does not live on the suit land but the same was previously registered in the name of his late father and uncle. That the late Marwa Makorere was also a previous owner of the land, to guard the same. That the suit land is currently occupied by the children of Marwa Senseri but conceded that he did not have photos as proof of the same.
 29. Jackson Maroa testified as PW5; he stated that the suit parcel is a neighbouring parcel and the same is occupied by the Applicants, that the suit land was sold to Marwa Senseri. The Plaintiffs thereafter closed their case.
 30. The Defence case proceeded for hearing on the same date, the Respondent testified as DW1; she adopted her Replying Affidavit as his evidence in chief. She stated that the suit land belonged to her late husband and was registered in the name of John Meng'anyi Magaiwa.
 31. It was her contention that the Applicants also live on the suit land but on a portion measuring approx. 1 Acre which they were given by her late husband. However, despite being given a portion measuring 1 Acre, the Applicants have taken over the entire parcel of land.
 32. She also produced the documents annexed to her replying affidavit as Defence Exhibits 1 to 5 as follows; copy of Death Certificate of Marwa Makorere Nyamorangi as Dexh. 1, copy of Green Card of parcel No. Bugumbe/ Isebania/ 96 as Dexh.2, copies of Certificate of Official Search as Dexh. 3, copy of letter to the Land Registrar as Dexh. 4, copies of proceedings in the Land Dispute Tribunal as Dexh. 5 in further support of his case.
 33. On cross-examination; she stated that she is the Administrator of the estate of her late husband Marwa Makorere. She also conceded that the Applicants live on the suit land but that she could not recall the exact date when they entered the suit land but the entry was during the lifetime of her late husband. She admitted that the Applicants have built houses on the suit land and carry out cultivation.
 34. She however reiterated that the Plaintiffs were given a portion to occupy measuring 1 Acre but there was no written agreement signifying the same. She confirmed that she has never filed any suit seeking the eviction of the Applicants from the suit land.
 35. It was also her testimony that John Meng'anyi Magaiwa bought the land but she was not sure if his registration was cancelled by the succession court. The Defence thereafter closed their case.
 36. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions and authorities which I have read and considered.



Analysis and Determination

37. I have reviewed the pleadings herein, the respective exhibits, parties' rival submissions and the applicable law in totality, on that account; it is my considered opinion that the main issue arising for determination is whether the Originating Summons dated 14/09/2021 is merited and I will proceed to determine the same on account of: -
- a. Competency of the suit as filed.
 - b. Proof of the claim on Adverse Possession to the required threshold.
 - c. Whether the reliefs sought are tenable.
38. The importance of the having the right, proper and all relevant parties in a suit cannot be overstated. The capacity of the said parties to sue and be sued is equally important as the same goes to the root of the court's jurisdiction to handle the matter. The provisions of Order 1 Rule 10 of the Civil Procedure Rules are clear on this regard.
39. The requirement to avail a certified extract of the title of the suit land in dispute in a claim of adverse possession, is aimed at clarifying the issue of ownership in terms of the registered owner and the size of the land. From a look at Pexh. 4 being a copy of the Green Card of the suit parcel; it is not in dispute that the suit parcel is registered in the name of one John Meng'anyi Magaiwa, having been registered on 16.3.2015. Both the Plaintiffs and the Defendant acknowledged the fact that the land was last registered in the name of John Magaiwa and that there is a pending Succession Cause suit at the Migori High Court in respect of the title of the suit land.
40. From the said exhibit; it is clear that the said registered owner of the suit land is not a party to this suit. The question that therefore comes to mind is whether the orders sought of extinguishing the title of the registered owner and in his place registering the Applicant as the proprietor of the suit land are tenable and justifiable where he is not a party to the suit.
41. Further, I am minded that there is a pending Succession Cause at the Migori High Court whose outcome directly touches on the suit land herein. There is therefore need to have all the respective and relevant parties to the suit to avoid condemning any person unheard.
42. The testimony of the Applicant and that of his witnesses is majorly centred on the Applicant's possession, occupation and use of the suit land. They did not establish a nexus between the registered owner John Meng'anyi Magaiwa and the Respondent herein, other than stating that there is a pending Succession Cause, seeking to revoke the grant issued in respect of the estate of the late Marwa Makorere Nyamorangi. It is not clear on what basis or ground that the Respondent herein, who is not the registered proprietor of the suit land has been sued and a demonstration of how the orders sought against her in respect to the suit land are tenable in the interest of justice.
43. The said John Meng'anyi Magaiwa is a necessary party in the instant suit; this is for the reason that the ultimate order that may be issued cannot be enforced without his presence and giving him an opportunity to be heard and give his side of the story. His presence is also necessary to enable the court to effectively and completely adjudicate upon and settle all the questions arising from the suit herein. See Technomatic Limited T/A Promopack Company vs Kenta Wine Agencies Limited & Another [2014] eKLR
44. It is also imperative to point out that even though the Applicants allege that the Certificate of Confirmed Grant giving the entire parcel to John Meng'anyi Magaiwa was revoked and the land parcel reverted back to the deceased Marwa Makorere Nyamorangi, there was no such evidence of the



revocation order or an Entry in the Green Card to signify the same. This court therefore has no way of ascertaining the said claims of revocation made by the Applicants.

45. Having found that the suit as filed is incompetent on account of the parties sued; I find that delving into the merits of the case would amount to an academic exercise.

Conclusion

46. In the premises therefore, the Originating Summons dated 14th September, 2021 is hereby Struck out with no orders as to costs. It is so ordered!

DATED, SIGNED and DELIVERED Virtually at MIGORI on 31st day of JANUARY, 2024.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No appearance for the Applicants

Mr. Kiseru for the Respondent

Court Assistant - Tom Maurice/Victor

